U.S. Department of Labor **Office of Administrative Law Judges**
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Issue date: 11Oct2001

In the Matter of	:	
	:	
ROBERT J. CREECH	:	
Claimant	:	
	:	Case No.: 2000-LHC-02126
v.	:	
	:	
CROWLEY MARITIME CORPORATION	:	
Employer	:	
	:	
and	:	
	:	
SIGNAL MUTUAL INDEMNITY	:	
ASSOCIATION, c/o ARM INSURANCE	:	
Carrier	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS	:	
Party-in-Interest	:	

L. Jack Gibney, Esq.
Jacksonville, FL
For the Claimant

James F. Moseley, Esq.
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Jacksonville, FL
For the Respondent

Phillip Giannikas, Esq.
Nashville, TN
For the Party-in-Interest

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER[1]

This is a claim for compensation for permanent total and permanent partial disability arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter "the Act"). A formal hearing was held in Jacksonville, Florida, on March 14, 2001. At the hearing the parties agreed to the following stipulations, submitted as Joint Exhibit 1:
The Act applies to this claim; Claimant and Employer were in an employer-employee relationship at the time of the accident/injury; the accident/injury arose out of and in the course and scope of employment; the date of the accident was June 1, 1999; timely notice of the injury was given to Employer; Claimant filed a timely notice of the claim; and all appropriate medical benefits have been paid under Section 7 of the Act. Further, in their post-hearing briefs, the parties stipulated that the Claimant's average weekly wage at the time of his injury was $790.75, with a corresponding compensation rate of $527.17.

Claimant contends that he is entitled to compensation for permanent total disability until he begins to earn income in his new employment as a real estate agent, at which time his injury should be reclassified as a permanent partial disability. Employer argues that Claimant suffered no permanent disability as a result of his injury while in its employment; that Claimant is able to perform his usual employment; that, if Claimant is not able to perform his usual employment, it has shown suitable alternate employment; that Claimant has no loss of wage earning capacity; and that it is entitled to Section 8(f) relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

At the time of the hearing, Claimant was 51 years old, had been married for 30 years, and had one adult son (EX 2, at 5). He graduated from high school in 1967, and went to work in the shipyards immediately thereafter (EX 2, 33). He has worked in a variety of jobs throughout his life, however, including driving a truck, managing a fast-food restaurant, selling commercial real estate, and selling metal building components (EX 2, at 33-50).

Before working for Employer, Claimant was in relatively good health, although he had injured his back in February 1988 while working for Ryder Truck Lines (TR 35). An MRI dated February 17,

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[1] The following abbreviations will be used when citing to the record in this case: EX–Employer's Exhibit; CX–Claimant's Exhibit; JX–Joint Exhibit; and TR–Hearing Transcript.

1989 revealed degenerative changes and "mild bulging" at the L5-S1 disc (CX 7). Claimant testified that he did not recall having pain radiating into his legs after his 1988 back injury (TR 32). He filed a workers' compensation claim and received a settlement in 1991 (EX 1). Claimant's doctor at the time stated he had reached maximum medical improvement in 1991, and imposed a lifting restriction of 30 pounds with no repetitive bending (EX 1). Despite these restrictions, Claimant lifted over 30 pounds in subsequent employment. However, he testified that he had no back pain between 1991 and his accident in 1999. His wife, Ila Jean Creech, testified that he did not complain of back pain between these dates (TR 37-38, 42, 44, 72).

Claimant began working for Employer as a casual driver/lasher in December 1997 (TR 41; EX 2, at 52). In this capacity, Claimant transported containers between the yard and the ship (TR 29). In July 1998, a crane was attempting to lift a container from his truck (TR 42-43). As the crane lifted the container, Claimant's truck remained attached to it and was lifted off the ground. It then dislodged, dropping Claimant's truck several feet and injuring him (TR 42-43). He remained off work for several weeks, but returned with no permanent injury (TR 43). About a year later, on June 1, 1999, Claimant was involved in the same type of accident, this time being dropped six to seven feet (TR 29). Claimant immediately felt pain in his back and his groin (TR 30). He informed his supervisor, and Employer referred him to Drs. Robert Chapa and Joseph Czerkawski (TR 29-30). Claimant remained off work and began receiving compensation for temporary total disability (TR 30). He underwent an MRI of his back on June 21, 1999, which revealed a disc herniation at the L5-S1 level (CX 1).[2] He began physical therapy soon after the MRI, which concluded in early October 1999 (CX 2).

Eventually, Claimant was referred to Dr. Calvin Hudson, a neurosurgeon, by Dr. Czerkawski (CX 1). Dr. Hudson saw Claimant for the first time on November 9, 1999 (CX 1). Dr. Hudson reported that Claimant was experiencing pain in his right leg radiating down to his toes as well as occasional neural pain in his left leg, although he remained neurologically intact (CX 1). By late February 2000, Claimant reported increased pain to Dr. Hudson, and the doctor recommended an additional MRI (CX 1). Dr. Hudson also noted that Claimant should not yet return to work, and that Claimant "has a permanent problem with his L5-S1 disc and . . . needs to be careful about excessive bending and heavy lifting for the rest of his life" (CX 1). On March 3, 2000, Dr. Hudson reported that the new MRI did not reveal any significant changes and Claimant should consider surgery if his pain was intolerable (CX 1). He did not specifically state that Claimant had reached maximum medical improvement, but did assign "permanent limitations" of "no lifting more than 35 pounds and no bending more than 5 times an hour," and stated that Claimant should not return to his regular work if it required lifting or bending outside these restrictions (CX 1). Dr. Hudson repeated these limitations in a July 24, 2000 report, adding that "[a]t this point, there's not much else to do except limit activities" (CX 1).

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[2] The report of the June 21, 1999 MRI diagnoses a "small right paracentral disk protrusion [at the L5-S1 level]." Disc protrusion is synonymous with disc herniation. *See Dorland's Illustrated Medical Dictionary*, at 759 (28th ed. 1994).

In addition to seeing Dr. Hudson, Claimant was referred to Dr. Michael Scharf for a consultation report, apparently on Employer's behalf. Dr. Scharf performed the examination on November 1, 1999, and wrote a page and a half report based on his examination (EX 9). He reviewed Claimant's medical history, including his June 1999 MRI stating he had a herniated disc at L5-S1, but concluded that Claimant had suffered only "a lumbar strain as a result of his fall," and stated that Claimant had reached maximum medical improvement and had no permanent disabilities (EX 9). He went on to state that Claimant was "currently functioning in the heavy labor category," that he had only a 3% impairment rating, and that he could return to his regular work. Further, without elaboration, he asserted that Claimant's impairment was due to his 1988 back injury (EX 9).

Based on Dr. Scharf's report, Employer discontinued compensation for temporary total disability after January 6, 2000 (TR 85). Despite Dr. Scharf and Employer's contentions, Claimant never attempted to return to his regular employment. Rather, he decided to pursue a career in real estate. He enrolled in classes in May 2000 (TR 46), and obtained his real estate license in July 2000 (EX 2, at 18). Claimant's wife is a successful real estate agent, and Claimant had previously worked as a licensed commercial real estate agent (EX 2, at 44-45). Claimant obtained a position with his wife's employer, Dan Jones Realty, in the summer of 2000 (TR 47-48). At the time of the hearing, he had not yet earned any money as a real estate agent, and was not yet taking calls that would lead to prospective sales (TR 48). However, he testified that he was very motivated to succeed as a real estate agent (TR 72). In addition, Mrs. Creech and Claimant's employer testified that he had the qualities needed to succeed as a real estate agent (TR 72; EX 3, at 28-29; EX 4, at 10).

Employer does not accept Claimant's current earnings (or lack thereof) as a real estate agent as representing Claimant's wage-earning capacity. Instead, it contacted Lisa Hellier, a vocational rehabilitation specialist, to perform labor market surveys and help Claimant find alternative employment. Ms. Hellier met with Claimant on May 19, 2000 (TR 91). She testified that he was polite and cooperative, but did not pursue any of the 40 job leads that she sent him between June and September 2000 (TR 93, 96; EX 6). Many of the jobs Ms. Hellier presented paid only $7-$8 per hour (TR 97; EX 6), although several jobs paid between $28,000 and $40,000 per year (EX 6). When questioned, Ms. Hellier testified that she felt Claimant was likely to obtain a job as a manger trainee at The Race Trac, a convenience store; as a customer service representative at PB&S Chemicals; as a third-party collection agent; and as a customer service representative (TR 99; EX 6). She further testified that she believed Claimant could earn between $25,000 and $30,000 in his first year of work, then $30,000 to $40,000 thereafter (TR 100). Although she stated that she did not generally consider commission-only jobs in her labor market surveys, Ms. Hellier stated that she believed that Claimant could eventually be a successful real estate agent (TR 98-99).

At the time of the hearing, Claimant complained of continued pain in his back and leg, which he stated was more severe if he sat for extended periods of time (TR 50). He stated that he had to constantly shift his position while sitting, could not lift over 30 pounds, could not walk for over 45

minutes, and could not stand still for extended periods of time (TR 51-52). He complained that more movement made his toes go numb, and that he had restricted his activities and recreation since his 1999 injury (TR 53-55). He also testified that he took Flexeril and Darvocet for pain as needed, but that he tried not to take the medication because of potential long-term damage to his kidneys (TR 33-34).

B. Discussion

Claimant and Employer dispute both the nature and extent of Claimant's disability. A permanent disability is one that has continued for a lengthy period and appears to be of lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding and Constr. Co.*, 17 BRBS 56 (1985). The determination of whether an injury is temporary or permanent is not based on the date that a claimant returns to work, but is based on medical evidence establishing the date at which claimant has received the maximum benefit of medical treatment. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Trask*, 17 BRBS at 60.

In the present case, both parties point out that only Dr. Scharf set a date of maximum medical improvement, and maintain that Claimant's disability became permanent on November 1, 1999, the date that Dr. Scharf stated he had reached maximum medical improvement. *See Post-Trial Brief on Behalf of Employee/Claimant*, at 9; *Employer/Carrier's Post Hearing Brief*, at 5. Because Dr. Scharf was the only physician to set a date of maximum medical improvement, and both the claimant and employer accept that date, I find that Claimant reached maximum medical improvement on November 1, 1999.

After the nature of a claimant's disability has been determined, the extent of his disability must be established. To make a prima facie case of total disability, Claimant must show that he cannot return to his regular and usual employment due to his work-related injury. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984). A claimant's usual employment is his job at the time he was injured. Dr. Hudson opined that Claimant was unable to return to his usual work as a casual driver/lasher (CX 1). Claimant testified that his job required significant lifting, and Dr. Hudson limited him to no lifting over 35 pounds (TR 42; CX 1). Employer urges that I find that Claimant is able to return to his usual employment, consistent with Dr. Scharf's opinion. In his brief report, Dr. Scharf states that Claimant suffered only a lumbar strain which was completely resolved, and that any permanent disability is due to Claimant's 1988 injury. He gives no basis for this finding, which is curious in light of the MRI report finding a disc herniation at the L5-S1 level. In reaching his conclusions, Dr. Scharf appears to reject Claimant's assertion that he had no radiating pain between his 1988 and 1999 back injuries, but continues to have significant pain radiating to his toes since his 1999 injury (EX 2, at 60-63). However, consistent with Dr. Hudson's opinion, I find Claimant's subjective

complaints of pain to be very credible. Claimant's behavior is consistent with his complaints of pain; he testified that he would rather work on the docks or drive trucks, but he is instead pursuing a sedentary career as a real estate agent (TR 51; EX 2, at 31-32). Additionally, every witness questioned testified that Claimant was motivated to succeed and no witness suggested that Claimant was malingering. Also, Dr. Scharf only saw Claimant once, whereas Dr. Hudson has seen Claimant consistently over a period of years. While the treating physician's opinion is not automatically entitled to deference, in the present case, where Employer's doctor rejected the patient's complaints of pain and provided no explanation for his findings which are contrary to the subjective and objective evidence, I find that the treating physician's opinion to entitled to the most weight. Therefore, I accept Dr. Hudson's contention that Claimant is unable to return to his usual employment, and Claimant has established a prima facie case of total disability.

Once the claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternative employment. This case differs from most in that Claimant concedes that Employer has shown suitable alternative employment, but urges that I find Employer must pay compensation for permanent total disability until he begins to earn money in his chosen profession. Although he does not specifically cite the case, Claimant appears to base his argument on *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122 (5th Cir 1994), and cases interpreting it. Under *Abbott*, if an employee is engaged in a vocational rehabilitation program, he may be found to be permanently totally disabled from the date of his maximum medical improvement through his completion of the program. In *Abbott*, the Board noted that to deprive the claimant of total disability status while he was in a vocational training program would "place him in a 'Catch 22' position of being unable to work without being expelled from the program, yet being unable to collect total disability compensation because of his undisputed ability to perform minimum wage work." *Id.* at 203. To prevail under *Abbott*, Claimant must demonstrate that his enrollment in the vocational training program has precluded other employment, that Employer was aware of and did not object to the rehabilitation program, that completion of the program would benefit Claimant by increasing his wage-earning capacity, and that Claimant has shown full diligence in completing the program. *See Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264, 266-67 (1997).

The facts in the matter at hand simply do not fulfill the standard set forth in *Abbott*. For one thing, Claimant is not truly engaged in a vocational rehabilitation program, but is engaged in on-the-job training of an indefinite period (EX 2, at 22-25). Further, even after Claimant's training is completed, there is no way to determine when he will begin to earn money, since his work is entirely commission-based. Claimant urges that I order Employer to pay compensation for total disability for as long as five years until he begins seeing a steady income from his work. *See Post-Trial Brief on Behalf of Employee/Claimant*, at 11. This is simply too long a period of time to require Employer to invest in Claimant's retraining where the training will not necessarily result in an increased wage earning capacity. Additionally, Employer has clearly objected to Claimant's pursuit of a real estate career at its expense, referring him to a vocational rehabilitation specialist who directed him to numerous other

positions and professions while he underwent his retraining. Thus, Claimant has failed to show that he is entitled to compensation for permanent total disability until he has begun to earn a steady income as a real estate agent.

Still, the burden remains on Employer to establish suitable alternative employment. An employer must demonstrate the existence of realistically available job opportunities for the claimant within the area where he resides which he is capable of performing considering his age, education, work experience, and physical restrictions. *See American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976). To show suitable alternative employment, the employer must convey "the precise nature, terms, and actual availability" of the proposed positions. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). Employer presented evidence of a variety of jobs through the testimony and labor market surveys of Ms. Hellier (EX 5, 6; TR 88-100). Based on Ms. Hellier's testimony and surveys, it would not be unreasonable to find that Employer has failed entirely in its burden of showing suitable alternative employment. However, since Claimant specifically states that he "concedes that [Employer has] satisfied their burden through the testimony of Lisa Hellier," I will treat Claimant's concession as a stipulation that at least some of the positions listed in the labor market surveys are suitable and available.[3]

Ms. Hellier's labor market surveys are so lacking in substantive information that it is difficult to discern what skills are required for many of the jobs listed. While Ms. Hellier completed numerous surveys over a period of six months, she failed to complete the "minimum employment requirements" section on almost all of the job description forms, and the occupational descriptions generally fail to give even a basic description of the job duties. In her January 12, 2001 letter, she states that she selected jobs based on a "computerized transferrable skills analysis," but fails to describe what his transferrable skills are or how they relate to the jobs presented (EX 6). It is insufficient simply to state that Claimant should be able to perform a job because a computer program determined he could do so. Additionally, in her deposition, Ms. Hellier admitted that some of the jobs listed on her labor market surveys were based on advertisements, which contain insufficient information to show suitability (EX 5, at 19, 22, 27). Furthermore, Employer made no attempt to have Ms. Hellier elaborate on the job requirements when she testified at the hearing. Rather, Ms. Hellier's testimony was brief and uninformative, and it is unclear why she was called to testify at the hearing. In fact, she would have provided no information regarding specific jobs and Claimant's wage-earning capacity if I had not questioned her on the subjects myself (TR 99-100). In addition, in her deposition testimony (EX 5) she demonstrated a lack of knowledge regarding the sources of much of her data. I will discuss Ms. Hellier's labor market surveys seriatim.

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[3]It does not appear that the Claimant intended to concede that Ms. Hellier's labor market surveys established that his wage-earning capacity was in the $25-30,000 range, which was the high end of the jobs she listed. Rather, it appears that the Claimant's stipulation related to jobs in the $8-10 an hour range. *See Post-Trial Brief on Behalf of Employee/Claimant*, at 11-12.

In her first labor market survey, dated June 6, 2000, Ms. Hellier listed the job of Inside and Outside Sales through Chatham Personnel. Under "occupational description," she listed the job's salary, stated that the job required some travel and mentioned that the job involved "mechanical-appliance repair" (EX 6). While Claimant has worked as a metal building components salesman, the job description form for the Inside and Outside Sales position does not list the requirements for the position other than the cryptic notation "mechanical-appliance repair," and therefore no showing has been made that it is suitable for the Claimant. Similarly, there is no evidence in the record that Claimant has ever managed apartment buildings, and Ms. Hellier made no attempt to describe what transferrable skills Claimant has that would make him able to obtain and perform the job of apartment manager (EX 6). Additionally, she listed a job as a leasing agent making $8 an hour, but gave no description. Finally, she did not list a salary for a sales position through Career Expo.

In her July 20, 2000 survey, Ms. Hellier presented 11 jobs. She listed a sales position with 84 Lumber, which stated that no lumber experience was necessary. Unlike most others mentioned on her surveys, this job description contained physical requirements, which included frequent walking and standing, which may be beyond Claimant's abilities (EX 6). The job of Industrial Sales involved lifting 21 to 40 pounds, which is outside Claimant's restrictions; a sales job through AAA Employment required "a degree," which Claimant does not have; a collector position with Credit Exchange required "medical experience," which Claimant does not have; and other collection jobs required "collections experience," which Claimant does not have. However, two of the dispatcher jobs appear to be within Claimant's abilities and restrictions.[4] The dispatcher job with Sissines provided on-the-job training and the physical requirements were within Claimant's restrictions. Similarly, a dispatcher job with Fueling Components provided on-the-job training, required a customer service background – which Claimant has – and was within his physical restrictions.

Ms. Hellier again completed labor market surveys on August 2, 2000 and August 10, 2000. The August 2 survey listed some of the same positions that appeared in her earlier surveys. She did not elaborate on the job requirements, however. This survey listed several collector positions, an area where Claimant has no experience. Ms. Hellier again failed to list his transferrable skills in the area of collection, and failed to elucidate the specific tasks Claimant would perform as a collector. She listed one dispatcher job that includes on-the-job training, and for which Claimant appears qualified. The August 10 survey included a job as a Customer Service Supervisor with International Transit, Inc. This job required the employee to coordinate bookings, assist customers, and "solicit and move freight by (dispatch)." While Claimant has performed sales positions, which require significant customer contact, he has not specifically worked in customer service for anything other than a fast food restaurant. Based

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[4] One other dispatcher position had been filled, and Ms. Hellier only suggested that Claimant submit his resume so the company could keep it on file. Obviously, this job cannot be considered available employment.

on the very limited information provided by Employer, I find it implausible that Claimant could obtain a supervisory position in customer service. The dispatcher job with Trailer Bridge appears to be within Claimant's restrictions and abilities, although again little information is provided. All other jobs listed on the survey are so lacking in information that they cannot be considered.

Ms. Hellier's August 22, 2000 survey contained a dispatcher position, a manager-trainee position with a convenience store, several customer service representative positions and more collector positions. The manager-trainee at a convenience store appears to be within Claimant's abilities based on his management of a fast food restaurant, but is outside of his physical restrictions. The labor market survey stated that the job "will accommodate physical restrictions," but failed to provide any details. Further, the job required the employee to stock shelves (EX 5, at 24), which appears outside Claimant's physical restrictions. In her October 30 survey, Ms. Hellier stated that other staff would assist when they were "available." This is insufficient to show that Claimant would not have to engage in an activity outside his physical abilities. The dispatcher position was not available. The job description for the customer service representative position with PB&S Chemical failed to describe the job. The job for Powertel specifically stated that "PC skills . . . are a must," but Claimant's computer skills are limited (EX 5, at 18). The collector position at Professional Debt Mediation specified that Claimant would be tested on the Fair Debt Practice Act. There is no indication in the record that Claimant has any knowledge of that act. The collector position with Randstad indicates that a banking background is preferred. Claimant has no such background. The labor market survey also includes a position as a Reconciliation Associate through Custom Staffing. This position's job description makes clear that Claimant has no experience in the area, although the job appears to be sedentary and within Claimant's physical restrictions. Similarly, the jobs of Invoice Control Clerk and Direct Accounting Associate are within Claimant's physical restrictions, but Claimant's background and skills give no indication that he would be well suited for the positions. The job of customer service representative through Custom Staffing stressed that the candidate must be experienced in the field of phone customer service. Claimant is not experienced in the area. The same is true for the collection positions through Custom Staffing. Finally, the purchasing coordinator position required a college degree and computer skills, which Claimant does not have.

Ms. Hellier's September 7, 2000, September 27, 2000 and October 30, 2000 labor market surveys are particularly sparse. She again listed jobs as customer service representatives or collection agents, failing to elaborate on the job descriptions. She listed a job as a service coordinator that may be within Claimant's restrictions, but included a minimum employment requirement of "computer," according to Ms. Hellier's survey. This job may be beyond Claimant's abilities because he has very limited computer skills. Further, there is no evidence that Claimant is capable of performing the job of credit union teller or the jobs with banks, as he has no background in financial matters and there is no evidence that he has transferrable financial skills. The September 27 survey included jobs for customer service representatives without further explanation. Ms. Hellier's own description of a customer service

representative, located at the back of the exhibit after her surveys[5], describes the job as one involving financial skill, which Claimant does not have, according to the record. Ms. Hellier's October 30 survey again presented customer service representative and collection positions. The customer representative jobs required computer skills and the collection position required Claimant to "interpret credit report," which there is no evidence that he can do. All other jobs present no explanation beyond the job title.

Although the Claimant might be able to perform many of the jobs on Ms. Hellier's surveys, the record fails to establish that he has the work experience or transferrable skills required for these positions. Employer has the burden of showing that any available alternative employment is suitable given the Claimant's physical limitations and vocational abilities. For most of the jobs presented, it simply has failed to do so. The only jobs that Claimant appears able to perform are some of the dispatcher jobs found on the July 20, August 2, and August 10 labor market surveys. These jobs have no physical restrictions and appear to be within Claimant's ability. Therefore, Employer has met its burden of showing suitable alternative employment through these dispatcher jobs.

Under Section 8(c)(21), Claimant can establish his entitlement to benefits for partial disability if he has a loss of wage earning capacity. Where the claimant is seeking benefits for total disability and the employer shows suitable alternate employment, the earnings established for the alternate employment may show the claimant's wage-earning capacity. The first jobs showing suitable alternative employment were presented on July 20, 2000. These jobs were dispatcher positions at Sissines and Fueling Components, and both paid $7 to $8 per hour. Since Claimant has no experience working as a dispatcher, he would most likely be hired at $7 per hour for these jobs. Thus, his wage earning capacity as of July 13, 2000, which is the date that the Sissines job opened, is $7 per hour.

In accordance with Sections 8(c)(21) and 8(h) of the Act, Claimant's wage earning capacity must be calculated to reflect Claimant's wage earning capacity at the time of his injury. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980). Claimant was injured in June 1999. In that month, the National Average Weekly Wage was $435.88. In July 2000, the month that Employer first showed that suitable alternative employment was available, the national average weekly wage was $450.64. Claimant would have earned $280 a week through the suitable alternative employment which I have credited. This number should be multiplied by .9672 to reflect the difference in the average weekly wage between June 1999 and July 2000, as $435.88 is 96.72% of $450.64. Thus, Claimant's post-injury wage earning capacity is $270.82. From July 13, 2000 onward, Claimant is entitled to compensation for permanent partial disability based on the difference between $790.75, his average weekly wage at the time of the injury, and $270.82, the average weekly wage he could have earned through suitable alternative employment at the time of his injury, which equals $519.93.

4. Section 8(f)

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[5] Employer did not number the pages of its lengthy exhibits.

Employer filed an application for limitation of liability under Section 8(f) with the District Director. Section 8(f) of the Act may be invoked by an employer to limit its liability for compensation payments for permanent disability to 104 weeks if the following elements are present: (1) the claimant has a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the disability which exists after the work-related injury is not due solely to the injury, but is a combination of the work injury and the pre-existing permanent partial disability, and is materially and substantially greater than that which would have resulted from the subsequent injury alone. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949). A pre-existing condition qualifies as a permanent partial disability under Section 8(f) if the condition is "sufficiently serious so that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of compensation liability." *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420, 425 (1990). The mere fact that an employee suffered a prior injury is, in and of itself, insufficient to establish a pre-existing permanent partial disability. Instead, "[t]here must exist, as a result of that injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46 (9th Cir. 1991).

Employer asserts that, because Claimant had a pre-existing permanent disability based on his back injury from 1988, "it is clear that Employer/Carrier has met its burden to establish the 8(f) defense." *See Employer/Carrier's Post Hearing Brief*, at 8. Also, Claimant testified that he told Employer about his back injury when he applied for work with Crowley (TR 58). The Director contends that Employer's argument is insufficient to establish entitlement to Section 8(f) relief. Rather, the Director states that Employer has failed to show that the first injury combined with the second injury to render Claimant more disabled than he would have been from the second injury alone. The Director is correct in its contention. Employer has presented absolutely no evidence that Claimant's current disability results from a combination of his first and second back injuries. It is true that Claimant had permanent restrictions based on his disc herniation from 1988. However, no doctor offered the opinion that the 1988 injury contributed to the 1999 injury or that, if Claimant had not had the 1988 injury, his condition following the 1999 injury would have been less severe.

Section 8(f) is an affirmative defense to the payment of compensation, and the employer has the burden of proving each of the elements required for application of the provision. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1984). Employer has simply failed to establish the required elements in this case to justify Section 8(f) relief.

ORDER

IT IS ORDERED that:

1. Employer shall pay to Claimant compensation for temporary total disability from June 1, 1999 through October 31, 1999, and permanent total disability from November 1, 1999 to July 12, 2000, based on an average weekly wage of $790.75; and permanent partial disability from July 13, 2000 onward based on a loss of wage earning capacity of $519.93.

2. Interest shall be paid on all unpaid compensation from the date due until paid in accordance with 28 U.S.C. §1961 (a).

3. Employer shall continue to pay medical expenses related to Claimant's injury.

4. Employer shall receive credit for all previous payments of compensation and medical expenses.

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JEFFREY TURECK

Administrative Law Judge